KUAN TED FATT

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUCHING
GEORGE SEAH FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CRIMINAL APPEAL NO. 37 OF 1983]
2 OCTOBER 1984

CRIMINAL LAW AND PROCEDURE: *Murder Charge - Provocation - Whether provocation is a question of fact or law - Summing up by the Judge - His failure to address the assessors on the possible charge of accomplicity of the eye witness - Whether assessors are sole judges of fact.*

The appellant was convicted of murder and was sentenced to death. The prosecution's case was that the appellant had lured the deceased to a lonely place and there wilfully committed the killing. The prosecution's evidence included the appellant's cautioned statement and the testimony of an eye witness. The defence consisted primarily of the following:

(a) Provocation by the deceased vide his remark "If I had raped your wife, so what?"

(b) That the appellant had never intended to kill and that the charge should be culpable homicide not amounting to murder.

(c) That the trial Judge had failed to address the assessors on the fact that the eye witness could be regarded as an accomplice.

(d) The trial Judge had erred by leaving the issue of provocation to the assessors as provocation is a question of law.

(e) That the trial Judge erred by saying that the assessors were the sole judges of fact because their function was merely advisory to the Court and not determinant of the verdict.

Held:

[1] That the learned Judge was correct in not regarding the eye witness as an accomplice because the appellant failed to establish that the eye witness participated in the offence.

[2] Provocation is a question of fact by virtue of Explanation to Exception 1 of s. 300 Penal Code.

[3] The learned Judge by saying that the assessors were sole judges of fact, was merely describing the division of functions between a Judge and assessors in a murder trial. Further, the appellant had failed to show that the learned trial Judge had usurped the assessors' function. The Judge was correct in concurring with the assessors in the manner in which he did.

[Appeal dismissed.]

Case referred to:
Davies v. DPP [1954] AC 378

Legislation referred to:
Criminal Procedure Code, ss. 197, 198
Penal Code, ss. 300, 302

For the appellant (assigned) - Mark Foong
For the public prosecutor - Nik Hashim, SFC

JUDGMENT

George Seah FJ:

The appellant was convicted at the Kuching High Court of murder of one Bojeng bin Boyong in contravention of s. 302 of the Penal code and was sentenced to death. He now appealed against his conviction.

At the hearing of the appeal Mr. Mark Foong appeared for the appellant and Senior Federal Counsel Encik Nik Hashim represented the Public Prosecutor.

Briefly, the prosecution case was that on the evening of 23 April 1981 the appellant together with his mistress, Ponny anak Senin, his daughter, Kuan Fong Khim (DW5), and his house guest, Fam Kui Hian (PW14) boarded a motor-car driven by the deceased Bojeng intending to go to a movie. On the way the appellant changed his mind and after ordering Ponny and his daughter Kuan to alight, the appellant asked the deceased to drive in the direction of Muara Tuang as he intended to visit his sick mother. It was the case of the prosecution that the appellant lured the deceased to a lonely place and there killed him intentionally. Apart from the cautioned statement of the appellant where he admitted to the killing the prosecution relied also on the testimony of PW14 Fam, who was present when the appellant stabbed the deceased to death, and then set fire to the motor-car.

The defendants may be summarised as follows:
A few days before the tragic incident, the appellant alleged that the deceased had committed rape on his mistress, Ponny anak Senin and that Ponny tried to commit suicide afterwards. Ponny was not called to substantiate this story as her where about was not known to the appellant. However, on the evening of 23 April 1981 the deceased came to the appellant's house and invited Ponny to see a movie. Under the pretext of going to the cinema, the appellant together with Ponny, his daughter Kuan Fong Khim (DW5,) house guest Fam Kui Hian (PW14) went into deceased's car. On the way appellant alleged that he changed his mind and ordered Ponny and his daughter to alight so that they could take a bus home. Appellant then directed the deceased to drive in the direction of Muara Tuang as he wanted to visit his sick mother. After parking the car in a side road and in the presence of PW14 Fam the appellant said that he asked the deceased why he raped Ponny. The deceased was alleged to have answered: "If I had raped your wife, so what?" On hearing this provocative reply the appellant alleged that he lost his temper and proceeded to assault the deceased. During the first fight he conceded that he used a knife to stab the deceased. The appellant alleged that he only intended to warn the deceased to keep away from his mistress Ponny and that he never had any intention to kill the deceased. Although he admitted inflicting the bodily injuries which resulted in the death of Bojeng bin Boyong the appellant argued that the culpable homicide did not amount to murder by reason of grave and sudden provocation. Alternatively, the act was committed without premeditation during a sudden fight in the heat of passion and upon a sudden quarrel.

Learned Counsel for the appellant complained that in his summing - up to the assessors the learned trial Judge had failed to warn the assessors that PW14 Fam could be regarded as an accomplice to the offence charged and the danger of accepting his evidence without corroboration. It was conceded by learned Counsel that at the trial in the Court below, he did not cross-examine PW14 about his being an accomplice; nor did he raise this matter in his address to the Court before the learned trial Judge summed up to the assessors. In short, not one word was said at the trial that PW14 was an accomplice or could be regarded as one.

For the Public Prosecutor the learned Senior Federal Counsel had submitted that there was no evidence at the trial that PW14 Fam had taken part in the offence of murder. On the other hand PW14 was not aware that the appellant was carrying a knife hidden at the back of his trousers pocket and that PW14 did not know that the appellant had indented to use a knife to kill the deceased. In other words, PW14 had no prior knowledge that the appellant had intended to commit the offence charged.

In our judgment, and having regard to the principle enunciated in *Davies v. DPP* [1954] AC 378 the learned Counsel for appellant failed to establish that PW14 Fam participated in the offence of murder and on the evidence produced before the trial Court, the learned Judge was right in not regarding PW14 as an accomplice. In his submission that PW14 could be so regarded learned Counsel for the appellant seemed to base his contention on two grounds, *viz:*

(a) that PW14 failed to report to the police about the offence charged, and

(b) that he left for Beliong, a coastal town, the next day.

In our opinion, none of these grounds relied on by learned Counsel is a valid one. Nevertheless, the learned trial Judge did point out to the assessors the various contradictions and discrepancies in the evidence of PW14 and warned them to treat the testimony of PW14 with great caution. In our judgment, the summing-up dealing with the evidence of PW14 was fair, accurate and helpful and none of the criticisms advanced have been made good. We therefore reject this ground of appeal.

Next, learned Counsel for the appellant argued that the learned trial Judge erred in law to leave to the assessors for their determination the question whether or not the grave and sudden provocation in the form of an answer given by the deceased, viz. "If I had raped your wife, so what?" was sufficient to reduce the offence of murder to one of culpable homicide not amounting to murder. Learned Counsel contended that this question is one of law to be decided by the learned trial Judge himself and not by the assessors. Learned Counsel for the appellant was unable to produce any authority binding on this Court to support such a proposition. However, the learned Senior Federal Counsel rightly drew our attention to the Explanation to Exception 1 to s. 300 of the Penal Code which reads:

> Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

In our judgment, this is a complete answer to the point raised and we find there was no merit in this ground of appeal.

The third ground of appeal was that the assessors, in forming their opinions, had failed to give due consideration to the directions in the summing-up of the learned trial Judge dealing with the question of grave and sudden provocation. Learned Counsel for the appellant was unable to show us in what manner the assessors had failed to give due and proper consideration to the directions of the learned trial Judge except to complain that the question on provocation framed by the learned trial Judge for the opinions of the assessors was too comprehensive, too general and too direct. The question posed by the learned trial Judge may be summarised thus:

> Are you in reasonable doubt that, the accused at the time he caused the death of Bojeng bin Boyong, was deprived of the power of self-control by grave and sudden provocation?

It was submitted that this question ought to be divided into several sub-questions. In our judgment, whether there should be only one general question or several sub-questions is best left to the discretion of the learned trial Judge after having regard to the facts of

each particular case, the evidence adduced before the Court and the conduct of the defence. However, the most important thing to bear in mind is that the question or questions framed by the trial Court should be simple, clear and unambiguous. They must be easily understood by the assessors so that they can give their opinions without difficulty. They may well be cases where several sub-questions should be posed where provocation has been put forward by the defence but in our opinion, this was not one of them. In the context of this case, we are of the opinion that the learned trial Judge was right in putting only one general question for the opinion of the assessors. This ground of appeal also failed.

Lastly, learned Counsel for the appellant submitted that the learned trial Judge erred in law by saying in his summing-up to the assessors these words:

> In this trial, I am the sole judge of the law and you (assessors) are the sole judges of fact.

It was argued that assessors are not jury and that their opinions are not binding on the learned trial Judge (s. 198 of CPC). As such, it was contended that the assessors cannot be regarded as "sole" judges of fact. In fact, they cannot even be regarded as "judges of fact", as they have no power to give verdict of "guilty" or "not guilty". It was submitted that their function is merely to "advise" the Court "on such particular issues of fact relevant to the charge as the Court may specify" (s. 197) and the learned trial Judge is free to reject such advice.

For the Public Prosecutor, the learned Senior Federal Counsel had submitted that under ss. 197 and 198 the assessors in a murder trial are judges of fact. In our opinion, when the learned trial Judge said to the assessors in his summingup that "In this trial, I am the sole judge of the law and you (assessors) are the sole judges of fact..." he was merely describing the division of functions between a Judge and assessors in a murder trial conducted under Chapter XXI of the Criminal Procedure Code (FMS Cap. 6). Although the law allows the learned trial Judge to disagree with what he regards as perverse the opinion of an assessor subject to his giving reason or reasons thereof, learned Counsel for the appellant was unable to point out any passage or passages in the summing-up that the learned trial Judge had usurped or attempted to usurp the function which is in the province of the assessors to determine. In our judgment, the fact that the learned trial Judge is not bound to conform to the opinions of the assessors or either of them, does not, derogate from the assessors their main function as arbiter of fact in a murder trial. From the very name "assessors" itself they are free to give their opinion on any particular issue of fact relevant to the charge which the learned Judge may specify at the trial. In our opinion, the use of the phrase to describe the assessors as "sole judges of fact" instead of "judges of fact" constituted only minor error which had not occasioned a failure of justice. This ground of appeal also failed.

We have read with care the record of appeal and the summing-up of the learned trial Judge and we are satisfied that the learned trial Judge was right to concur with the unanimous opinions of the assessors that the defence had failed to bring his case within the special exceptions, viz, grave and sudden provocation (Exception No.1) and/or sudden fight (Exception No. 4) to s. 300 of the Penal Code.

For the above reasons we hold that none of the submissions advanced by learned Counsel for the appellant for quashing the conviction are tenable. The appeal against conviction is accordingly dismissed.

Also found at [1985] 1 CLJ 150